

1 The facts were stipulated to by the parties and are attached as
2 Appendix A. Exhibits likewise were admitted by stipulation. Oral
3 argument was heard. From the briefs, exhibits, stipulated facts, and
4 contentions of the parties, the Board makes these

5 CONCLUSIONS OF LAW

6 I

7 The Board has jurisdiction over these persons and these matters.
8 RCW 70.105A.070.

9 II

10 In 1983, the Legislature enacted Chapter 70.105A RCW providing for the
11 assessment and collection of annual fees for the support of activities
12 to control hazardous wastes in this state. The Department of Ecology
13 adopted implementing regulations in 1984: Chapter 173-305 WAC.

14 One category of fee was that imposed on generators of hazardous
15 wastes. RCW 70.105A.030, WAC 173-305-030. Another was the fee imposed
16 on hazardous waste handlers. RCW 70.105A.040, WAC 173-305-060.

17 This case involves an attempt to impose a generator's fee. The
18 question is whether, under the law, a fee can properly be charged to
19 an entity in Blackstock's position.

20 It is conceded that the fire retardant sealer which is the subject
21 of this appeal at some point became hazardous waste.

1 III

2 The fee imposed under RCW 70.105A.030(1) is owed by a person "for
3 the privilege of utilizing or operating an identified site" in
4 connection with an extensive list of business activities "within this
5 state." Statutory context and interpretive regulations support the
6 conclusion that an "identified site" is one at which hazardous waste
7 is generated. See RCW 70.105A.030(4), WAC 173-305(1)(C).

8 IV

9 Our review of the statutory scheme leads us to conclude that, for
10 the purposes of assessing the fee, the person "utilizing or operating"
11 a site where hazardous waste is generated is the person generating the
12 hazardous waste.

13 V

14 The term "generate" is defined in RCW 70.105A.020(9) to mean
15 any act or process which produces hazardous
16 waste or first causes a hazardous waste
to become subject to regulation.

17 We conclude that hazardous waste was generated at Blackstock's
18 yard #2 in Seattle when the fire retardant sealer was turned over to
19 Northwest Tank Service for disposal. A usable product then became
20 hazardous waste at an identified site within this state.

VI

However, because hazardous waste was generated does not necessarily mean that the owner of the site was the "generator". Neither the fee statute nor the hazardous waste management law (Chapter 70.105RCW) define the term "generator". The term is defined in the state's Dangerous Waste Regulations at WAC 173-303-040-(34):

"Generator" means any person, by site, whose act or process produces dangerous waste or whose act first causes a dangerous waste to become subject to regulation. (Emphasis added)

We believe this definition of "generator" is appropriate to use in the context of a fee case and we have used it here.

VII

Where, as here, the creation of hazardous waste is not accidental, we decide that the "generator" of hazardous waste is the person or entity by whose exercise of discretion the actions which produce the waste are carried out. We do not think the Legislature intended that the incidence of the generator's fee should fall on those who are simply implementing the valid directions of a principal which, when followed, result in the creation of hazardous waste.

VIII

Blackstock in this case acted solely as the agent for others. It had no authority to decide to treat the fire retardant sealer as a waste material, and it did not make any such decision. Rather it faithfully carried out the terms of its agency. Blackstock's securing the services of Northwest Tank Service and turning the retardant over to them for disposal were actions done at the direction of others and were purely ministerial in character.

IX

Accordingly, we hold that the actions which generated the hazardous waste, though performed by Blackstock, were not legally the "acts" of Blackstock for purposes of the statute. These actions were rather, in law, the "acts" of those who directed that they be taken.

Therefore, Blackstock was not, under these facts, a "generator" and was not the person "utilizing or operating" the site as to the "act" of generation in question.

X

Ecology notes that Blackstock identified itself as a generator of hazardous waste by the submission of a "Generator Annual Dangerous Waste Report" for 1984, and argues that this is an admission by which

1 the company should be bound. We disagree . The area of hazardous waste
2 regulation is complex, confusing and relatively new. Everyone, the
3 regulators and the regulated alike, are somewhere on the learning
4 curve. In attempting to comply with the law by submitting a form
5 advising of the disposal of the sealer, Blackstock did not indelibly
6 affix any label to itself.

7 Our review is de novo and our decisions are based on the facts
8 presented to us. Under these facts, we have concluded that Blackstock
9 was not a generator, no matter what it may at one point have called
10 itself.

11 XI

12 This appeal challenges the denial of a request for exemption from
13 fee made under WAC 173-305-030(5). In requesting the waiver Blackstock
14 checked the box on the form opposite the statement that it generated
15 regulated hazardous waste only once during the year. This statement,
16 if true, could only lead to a reduction of the fee not its elimination
17 altogether. Nonetheless, Ecology might well have been put on inquiry
18 by the brief narrative explanation of events which Blackstock included
19 under "additional information." The regulation specifically provides
20 that the agency may request additional information before ruling on
21 exemption requests.

1 Be all this as it may, the record made here has convinced us that
2 Ecology erred when it refused to exempt Blackstock for the generator's
3 fee.
4

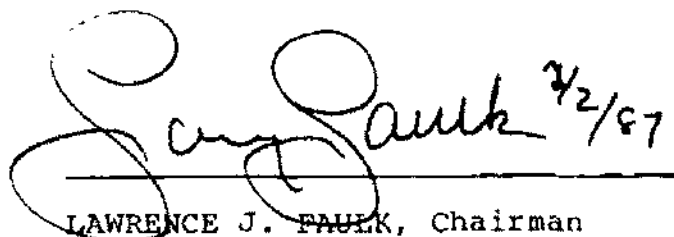
5 From these Conclusions of Law the Board enters this

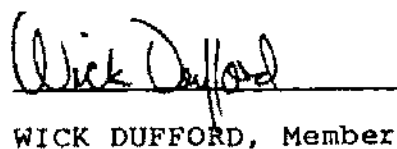
6 ORDER

7 The Department of Ecology decision denying the waiver request of
8 Blackstock is reversed.

9 DATED this 2nd day of February, 1987.
10

11 POLLUTION CONTROL HEARINGS BOARD

12
13  2/2/87
14
15 LAWRENCE J. FAULK, Chairman
16

17
18
19 
20 WICK DUFFORD, Member
21

RECEIVED
JUL 11 1985

APPENDIX A

ACCEPTANCE OF SERVICE

CLERK'S STAMP

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

H. W. BLACKSTOCK COMPANY,)	
)	
Appellant,)	PCHB No. 85-264
)	
v.)	STIPULATION OF FACTS
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF ECOLOGY,)	
)	
Respondent.)	

For the purposes of this contested case only, the parties stipulate that the following facts may be considered by the Board as true and that the attached exhibits may be admitted into evidence, reserving, however, the right of either party to object to any of such evidence on the basis of relevancy. This stipulation is without prejudice to either party introducing other evidence at the hearing in this matter.

PARTIES

1. Appellant H. W. Blackstock Company (Blackstock) is a corporation doing business in the State of Washington engaged in a number of construction-related activities. These activities include purchasing materials for customers and expediting the delivery of those materials to those customers.

KENNETH O. EIKENBERRY ATTORNEY GENERAL
Jeffrey D. Goltz
Assistant Attorney General

Temple of Justice
Olympia Wa (206) 459-6160
98504 Telephone

1 2. The respondent Department of Ecology (Ecology) is the
2 agency of Washington State government charged with resolution of
3 the state's hazardous waste management program under chapters 70.105
4 and 70.105A RCW, including the hazardous waste fee program under
5 chapter 70.105A RCW.

6 BLACKSTOCK'S ACTIVITIES

7 3. Blackstock had a contract with the North Slope Borough
8 (Borough) for purchasing materials and supplies specified by them
9 through their agent Frank Moolin & Associates (FMAA) who are the
10 architects, engineers, designers and management contractor for
11 construction of the Barrow Water & Sewer Project located at Barrow,
12 Alaska for the North Slope Borough. FMAA would furnish the detailed
13 description and specifications for purchase of material to Black-
14 stock. Blackstock would then seek price quotations and suppliers
15 and furnish the information to FMAA who in turn would get approval
16 from the Borough for the purchase. After approval by the Borough,
17 Blackstock would then order the material for shipment. The bill-
18 ing for the materials was handled through Blackstock. The Borough
19 would authorize purchases up to a maximum amount for a particular
20 period of time. When the authorized purchases by Blackstock had
21 equalled the authorized amount, all purchases would cease until
22 the Borough authorized additional funds for additional purchases.
23 The purchase of the 3,000 gallons of fire retardant sealer involved
24 in this appeal was handled in accordance with Blackstock's contract
25 as follows:
26

1 Blackstock's first contact with this purchase was on June 4,
2 1982 when it received a telecopier transmittal of a purchase
3 requisition number BUS2769, originated by Dave Jezek who is part
4 of FMAA, Logistics Manager. Purchase requisition 2769 was also
5 accompanied by requisition 2770 and 2771, each for 1,000 gallons,
6 for a total of 3,000 gallons initially requisitioned.

7 FMAA had previously entered into discussions and
8 negotiations with Flecto Company, Inc. which was the supplier for
9 the material located in Oakland, California. FMAA dealt with
10 Robert D. Arsenault, the Seattle representative of Flecto to
11 arrange for the Flecto Company, Inc. to manufacture the sealer to
12 FMAA's specifications.

13 In the normal course of business Blackstock also received,
14 by mail, copies of the requisitions which mailings included the
15 signatures of the Borough official approving the same and also
16 the Borough's accounting number and information handwritten on
17 the requisitions. Upon receiving the purchase requisitions
18 Blackstock ordered the material from the Flecto Company.

19 4. A copy of the agreement between Blackstock and the
20 Borough is attached as Joint Exhibit (JE) 1.

21 5. Copies of North Slope Borough Purchase Requisitions
22 Nos. 2769, 2770, and 2771 are attached as JE-2. These are the
23 preliminary requisitions received by Blackstock from the Borough
24 via FMAA for which Blackstock obtained price quotations.

1 6. Attached as JE-3 Purchase Orders 36281, 36282, and
2 36283 from Blackstock Company to Flecto Company implementing the
3 North Slope Borough Requisitions described in ¶ 5 above.

4 7. Attached as JE-4 are internal Blackstock memoranda
5 notifying Blackstock employees of the purchase and directing the
6 handling of the materials.

7 8. Attached as JE-5 are invoices for the Flecto Co., Inc.
8 and bills of lading for the material ordered by the Borough.

9 9. Blackstock was first informed by phone call followed up
10 by writing to hold the material in Seattle and not ship it to the
11 Borough while they were reconsidering the decision. Blackstock
12 was subsequently informed both by phone call and in writing from
13 FMAA and the Borough that the material would not be used, that it
14 should not be shipped and requesting Blackstock to attempt to
15 sell the material. Blackstock had no part in that decision. A
16 copy of the letter from FMAA to Blackstock confirming that Black-
17 stock should not ship the materials attached as JE-6. Attached as
18 JE-7 is an internal Blackstock memorandum stating that FMAA has
19 directed Blackstock not to ship the fire retardant.

20 10. Flecto Co. attempted to sell the material to another
21 purchaser, but could not. It so advised Blackstock by letter of
22 August 9, 1982, a copy of which is attached as JE-8. A copy of a
23 message to FMAA with that letter attached is attached as JE-9.
24 A copy of a telecopier message from FMAA to Blackstock enclosing
25 specifications for resale is attached as JE-10.
26

27 STIPULATION OF FACTS

-4-

1 11. Blackstock then attempted to dispose of the material.
2 Attached as JE-11 are handwritten notes from Blackstock reflecting
3 attempts to sell the material for the Borough and price quota-
4 tions. These notes also reflect an understanding by Blackstock
5 that the materials would have to be disposed as regulated hazardous
6 waste.

7 12. Attached as JE-12 is an October 11, 1983, handwritten
8 memorandum memorializing a communication from Norm Hopp of
9 Blackstock to Richard Qchoa of FMAA of a quoted price for,
10 disposing of the material.

11 13. Attached as JE-13 is a February 16, 1984 letter to Norm
12 Hopp from Robert Arsenault, sales representative for Flecto,
13 regarding his attempts to sell the sealer and requesting a sample.

14 14. Attached as JE-14 is an August 15, 1984 letter to Norm
15 Hopp from FMAA attaching correspondence with the Borough and
16 authorization for disposal of the retardant and pointing out that
17 attempts to sell the retardant have been unsuccessful.

18 15. Attached as JE-15 is Barrow Utilities Material
19 Acquisition Request dated August 22, 1984, No. 2848 authorizing
20 Blackstock to dispose of the retardant.

21 16. Attached as JE-16 is an August 28, 1984 handwritten
22 note referencing a conversation between a Blackstock employee and
23 Larry Peterson of Northwest Tank Service with attachment of NTS
24 of price for disposal of the material.
25
26

1 17. The quoted price for disposal increased with the
2 passage of time. Attached as JE-17 is a copy of handwritten
3 notes memorializing this fact.

4 18. Attached as JE-18 is a speed message dated September 18,
5 1984, to Blackstock authorizing the increased price for disposal
6 of the material.

7 19. Attached as JE-19 is a Barrow Utilities Project Material
8 Acquisition Request containing signed authorization from the
9 North Slope Borough for disposal of the materials.

10 20. Attached as JE-20 is the purchase order for Blackstock
11 to NTS directing NTS to proceed with the disposal.

12 21. Attached as JE-21 is a Blackstock internal memorandum
13 advising of the disposition of the material.

14 22. Attached as JE-22 is NTS Invoice No. 8037 dated
15 October 22, 1984, containing the billing for disposal of the
16 material.

17 23. Attached as JE-23 is Blackstock's letter of transmittal
18 dated November 5, 1984, attaching documentation showing disposal
19 by NTS together with NTS's letter committing not to sell the
20 material and advising that it will be disposed of at a Class I
21 disposal site. (The material was disposed of in Oregon.)

22 24. Attached as JE-24 is Borough's Material Receiving Report
23 referencing purchase requisition No. 2848, memorializing disposal
24 of the material.

25 25. Blackstock was not paid for selling the retardant since
26 it was not sold. Blackstock was paid for its efforts in

27 STIPULATION OF FACTS

-6-

1 attempting to dispose of the product, as part of its purchasing
2 contract.

3 26. On February 27, 1985, Blackstock filed a Generator
4 Annual Dangerous Report with the Department. A copy of that
5 report is attached as JE-25.

6 DEPARTMENT OF ECOLOGY ACTIVITIES

7 27. On May 30, 1985, the Department sent to Blackstock a
8 Hazardous Waste Generator Assessment. A copy of that assessment
9 is attached as JE-26.

10 28. On June 11, 1985, Blackstock sent the Department a
11 Request for Waiver of Fee, a copy of which is attached as JE-27.

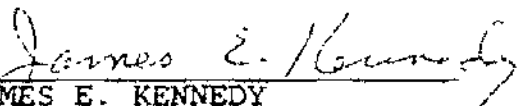
12 29. That fee was denied by letter of November 22, 1985, a
13 copy of which is attached as JE-28.


14 30. A reassessment was sent along with the denial letter, a
15 copy of which is attached as JE-29.

16 31. The revenue from the hazardous waste fees have been and
17 are used exclusively for the administration of the Washington
18 State hazardous waste program under chapters 70.105 and 70.105A
19 RCW. The revenues generated do not cover the costs of
20 administration of the hazardous waste management program, so
21
22
23
24
25
26

1 there is no surplus for the hazardous waste cleanup (remedial
2 action) program.

3 DATED this 30th day of May, 1986.

4
5 
6 JAMES E. KENNEDY
7 Attorney for Appellant
8 H.W. Blackstock Co.


JEFFREY D. GOLTZ
Assistant Attorney General

Attorney for Respondent
State of Washington
Department of Ecology